STATE OF MICHIGAN

COURT OF APPEALS

RICHARD KRANTZ,

Plaintiff-Appellant,

v

HOWMET CORPORATION,

Defendant-Appellee.

UNPUBLISHED
June 30, 2000

No. 216525
Muskegon Circuit Court
LC No. 90-026815-CK

Before: Saad, P.J., Jansen and Talbot, JJ.

PER CURIAM.

Relying on the same employment handbook at issue in *Lytle v Malady (On Remand)*, 458 Mich 153; 579 NW2d 906 (1998), plaintiff filed a lawsuit in 1990 alleging, among other things, wrongful discharge in violation of express and implied contract and legitimate expectation of just-cause employment. A jury found in favor of plaintiff on his breach of contract/wrongful discharge claim and awarded him $195,000 in damages.[1] Defendant appealed the verdict and order denying his motion for JNOV and/or new trial, and this Court affirmed. *Richard Krantz v Howmet Corp*, unpublished opinion per curiam of the Court of Appeals, issued February 23, 1995 (Docket No. 159045).[2] Defendant appealed the decision to the Supreme Court, which held the application for leave in abeyance pending its decision in *Lytle*. Once decided, the Supreme Court reversed this Court's decision and remanded the matter to the trial court for proceedings consistent with *Lytle*. Plaintiff now appeals as of right the trial court's order granting defendant's motion for JNOV following the Supreme Court's remand order. We affirm

[1] The jury entered a verdict of no cause of action on plaintiff's age discrimination claim.

[2] With respect to the breach of contract/wrongful discharge issue, the panel held that while the handbook contained limiting language, the just-cause language presented a jury question regarding whether "it was reasonably capable if instilling plaintiff with a legitimate expectation of just-cause employment." *Id.* at 1.

Following his appeal to this Court, plaintiff withdrew his claim that defendant's employment handbook created a just-cause employment relationship. As his sole issue on appeal, plaintiff argues that the trial court erred in rejecting his alternative argument that the jury could have found that his legitimate expectations claim was based on the language contained in defendant's pamphlet entitled "Business Ethics and Standards of Conduct," a/k/a "Business Ethics Policy" (BEP), which provides in part:

> . . . no employee will be demoted or discharged or otherwise discriminated against as a reprisal for disclosing a suspected violation of law relating to a defense contract.

Plaintiff contends that the trial court's conclusion – that the wrongful discharge verdict could not have been based on the BEP since he never apprised the jury of that theory during opening statement or closing argument – was erroneous because the BEP was admitted at trial and his testimony circumstantially established that he was terminated in violation of the policy. We agree with the trial court.

This Court reviews a trial court's decision on a motion for JNOV de novo. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 321; 602 NW2d 633 (1999). When evaluating a motion for a JNOV, a court must consider the evidence and all legitimate inferences in the light most favorable to the nonmoving party to determine whether a factual question exists upon which reasonable minds could differ. *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 406; 571 NW2d 530 (1997). "If reasonable jurors could honestly have reached different conclusions, neither the trial court nor this Court may substitute its judgment for that of the jury." *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 115; 593 NW2d 595 (1999).

After a thorough review of the extensive record, we conclude that the trial court properly rejected plaintiff's contention in granting defendant's motion for JNOV. First, throughout the initial proceedings and trial, plaintiff based his breach of contract/wrongful discharge claim almost exclusively on the just-cause provision and other assurances contained in defendant's employee handbook. While the complaint alleged breach of express or implied contract, and legitimate expectation of just-cause employment generally, it did not mention or suggest that his breach of contract/wrongful discharge claim was based on a violation of the BEP. See MCR 2.111(b)(1); *Miller v Inglis*, 223 Mich App 159, 169; 567 NW2d 253 (1997) (a complaint must state specific allegations necessary to reasonably inform the adverse party of the nature of the claims that the adverse party is called upon to defend). Further, plaintiff did not mention the BEP in response to defendant's motion for summary disposition or in plaintiff's trial brief, which focused entirely on the provisions in the handbook as forming the basis for his claim.

Nor is there any indication that the theory concerning the BEP was tried by defendant's express or implied consent. MCR 2.118(C)(1). Plaintiff's counsel mentioned the BEP in his opening statement, but never apprised the jury of the theory that it created a just-cause relationship or otherwise provided a basis for his alleged wrongful discharge. MCR 2.507(A) ("[b]efore the introduction of evidence, the party who is to commence the evidence must make a full and fair statement of that party's case and the facts the party intends to prove"). Similarly, although the BEP *was* admitted as a trial exhibit and

discussed briefly during plaintiff's testimony,[3] plaintiff's counsel did not mention the BEP during either his closing or rebuttal arguments nor argued that plaintiff relied upon its terms as creating just-cause employment. This is particularly noteworthy in light of the parties' agreement that they would raise all issues for the jury's consideration during closing arguments in lieu of specific instructions setting for the parties' theories. Further, plaintiff did not request a special verdict in accord with MCR 2.514, and expressly agreed to the general verdict form prepared by the trial court. See *Palenkas v Beaumont Hospital*, 432 Mich 527, 566; 443 NW2d 354 (1989) (Archer, J.). On the record before us, it appears that plaintiff expressly argued the BEP as a basis for his breach of contract/wrongful discharge claim for the first time after the Supreme Court's decision in *Lytle* when it appeared that the primary basis for his claim (i.e., the handbook) was no longer viable. Under these circumstances, we are convinced that the jury could not have found that plaintiff relied on the language contained in the BEP as creating a legitimate expectation of just-cause employment. For the same reasons, we conclude that this issue was not properly preserved for review. See *Ewing v Heathcott*, 348 Mich 250, 255; 83 NW2d 210 (1957) (an issue that was neither pleaded, nor mentioned at pretrial, nor the subject of proper amendment at trial, may not be raised for the first time on appeal); *Vanderhoef v Parker Bros Co, Ltd*, 267 Mich 672, 681; 255 NW 449 (1934) (a theory that was not raised in the case either in the pleadings or in the testimony was not subject to review because it was "not squarely presented to the jury or the court below").

Even assuming the issue had been properly preserved and argued as a theory to the jury, JNOV was nonetheless proper because the BEP did not constitute a basis for plaintiff's legitimate expectations claim as a matter of law. To prevail on such a claim, it is not enough for the plaintiff to show that he was discharged in violation of a company policy; the plaintiff must show that he was terminated in violation of a policy to discharge only for just cause. *Rood v General Dynamics Corp*, 444 Mich 107, 140; 507 NW2d 591 (1991); *Valentine v General American Credit, Inc*, 420 Mich 256, 258; 362 NW2d 628 (1984) ("[t]he only right held in *Toussaint* [*v Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980)] to be enforceable was the right that arouse of out a promise not to terminate except for just cause"); see also *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 532; 473 NW2d 652 (1991) (Riley, J.) (legitimate expectations theory did not extend to employer compensation policy). To this end, employer policy statements concerning employee discharge, if any, must be examined to determine whether they "are reasonably capable of being interpreted as promises of just-cause employment." *Rood, supra* at 140. Where the employer policies are incapable of such an interpretation, the claim should be dismissed as a matter of law, but where they are capable of two reasonable interpretations, the issue is for the jury. *Id.* at 140-141. See also *Lytle, supra* at 164-165, citing *Rood, supra* at 138-139 (delineating the two-step inquiry involved in evaluating legitimate expectations claims).

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[3] Plaintiff testified that he was aware of the language in the pamphlet, that he relied on the policy when he called the corporate office twice to report quality control violations by his supervisor, that he was demoted after he made the first report, and that he was discharged more than two years later.

In the present case, we cannot conclude that the BEP is reasonably capable of being interpreted as a promise for just-cause employment. The language employed does not establish a general standard for termination of employment and, instead, merely states that "no employee will be demoted or otherwise discriminated against as a reprisal for disclosing a suspected violation of law relating to a defense contract." Moreover, plaintiff did not submit the BEP on appeal and has provided no evidence regarding the time or manner of its distribution in relation to the handbook, which he now concedes does not provide a basis for just-cause employment. At most, violation of the language employed in the BEP would provide the basis for separate retaliatory discharge or whistleblower-type claims. However, such claims were never pleaded or presented to the jury by way of argument or instruction and, in any event, were not supported by sufficient evidence at trial. Accordingly, the trial court properly granted defendant's motion for JNOV following the Supreme Court's remand order.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Michael J. Talbot